76-1591

Supreme Court, U. S.
FILED
MAY 13 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976.

JOSEPH SAPIA,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

Petition for Certiorari to the Court of Appeals, State of New York.

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In the

SUPREME COURT OF THE UNITED STATES

October Term 1976.

No. _____.

- -X

JOSEPH SAPIA,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

- -X

PETITION FOR CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK.

STATEMENT.

Petitioner Joseph Sapia respectfully prays that this Court will grant a writ of certiorari to the Court of Appeals of the State of New York, to review its determination rendered the 28th day of December, 1976, which affirmed the order of the Appellate Division of the Supreme Court, First Department, which in turn

affirmed the judgment of the Supreme Court, New York County, rendered the 14th day of November, 1974, convicting petitioner of the criminal sale of a dangerous drug in the first and third degrees, after trial before Sandler, J., and a jury.

Sapia is presently incarcerated pursuant to a mandatory prison term of 15 years to life.

In the Appellate Division, First Department, Justice (now Presiding Justice) Francis T. Murphy, Jr., dissented with an opinion.

OPINION BELOW.

The opinions of the Court of Appeals and the Appellate Division, First Department, are reprinted in the appendix hereto.

JURISDICTION.

The jurisdiction of this Court is predicated upon 28 U. S. C. §1257(3). The Court of Appeals of New York affirmed the order of the Appellate Division, First Department, on the 28th day of December, 1976.*

QUESTIONS PRESENTED.

1. Whether petitioner was denied a Sixth Amendment right to confrontation

* Petitioner is incarcerated and informed counsel just recently that he wished a petition filed. He had to borrow funds to do so.

and a Fifth Amendment right to a fair trial by virtue of his inability to call a prosecution informant, Earl Fodderell, as a witness, despite the fact that the indictment was predicated in part upon his testimony, and tapes containing his conversations were played to the jury?

2. Whether the prosecution violated the Fifth Amendment right to a fair trial by indirectly using the informant, Earl Fodderell, as a witness, through the playing of tape recordings, but denying a right of cross examination by failing to call Fodderell as a witness, and by refusing the Trial Court's request that it grant Fodderell immunity so that petitioner could compel him to testify?

3. Whether the use of a statement taken by the police from petitioner, after his indictment, while he was in jail, in the absence of his attorney, violated Sapia's rights under the Fifth and Sixth Amendments of the United States Constitution?

4. Whether the Trial Court erred in declining to permit petitioner's counsel or petitioner to learn what statement he had made to the police after his arrest and while he was in custody? This ruling had a chilling effect on petitioner's determination whether to take the stand (*Harris v. New York*, 401 U. S. 222).

5. Whether petitioner was given a fair trial?

6. Whether petitioner was deprived of a Sixth Amendment right to call witnesses and of a Fifth Amendment right to

a fair trial, when the Court precluded him from adducing evidence from his attorney and from other witnesses who were available, that he was entrapped?

7. Whether petitioner was deprived of due process of law by the Trial Court's presentation of a conspiracy to the jury when none was charged in the indictment?

8. Whether petitioner's Fifth Amendment right to a fair trial was violated by the prosecution's failure to apprise him of the fact that a hearing had been held wherein witnesses testified concerning Sapia, but the identities of which were withheld from Sapia.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fifth and Sixth Amendments of the United States Constitution are involved herein.

THE BACKGROUND OF THE CASE.

Petitioner had been indicted on June 27th and July 6th, 1973, for drug violations predicated upon information supplied as a result of the efforts of a confidential informant by the name of Earl Fodderell.

The indictments were consolidated for trial and both failed to allege any conspiracy.

We submit that it is fair to say that without the assistance of Fodderell, it is not likely that an indictment could have been returned against the petitioner herein. Although the record is somewhat prolix, we submit that the legal issues to which we shall advert, *infra*, mandate reversal irrespective of the factual considerations. We do not concede that the facts adduced warranted conviction for criminal "sale" of a dangerous drug.

1 - But the transcendant issue which stalks through the pages of the record is the use by the People of a "confidential informant," Earl Fodderell. Fodderell was the essential link necessary to arrest and indict Sapia.

It was Fodderell whose voice was on tape; who told the police about Sapia; who was present at or instrumental in the various transactions leading up to Sapia's arrest.

Yet, incredible as it may seem, the defense was precluded from confronting this most important of all witnesses to the alleged transgressions. The People elected not to use him as their witness, since they were more than content to utilize him via the testimony of the undercover officer, Heyward, and through the tapes.

Conversations in which Fodderell was quoted, were revealed to the jurors.

Since Fodderell was a cooperating informer, and for all intents and purposes was playing out a scenario written

and directed for him by the police when he met appellant, we submit that he could not be deemed a co-"defendant" and therefore, could not be incriminated by anything that was said or done by him while playing that role. This was true since Fodderell was a police agent, working hand-in-glove with Officer Heyward and the others.

Yet, when the defense called Fodderell as their witness, he was permitted to plead the "Fifth Amendment!" and forestall any examination since the prosecution urged that he could be incriminated, and also refused to offer him immunity, which the Court suggested it do as a matter of fairness.

To make the matter worse, Fodderell admitted on the stand, out of the jury's presence, that if permitted to testify, he would exculpate Sapia, whom he described as "an innocent man."

2 - The Trial Court also precluded the petitioner from interposing an entrapment defense by ruling that the defendant would have to waive his Fifth Amendment privilege and testify if he chose to urge such a defense.

The Court was told that a tape recroding and sealed, self-mailed registered letter was in the possession of the defense, which was prepared before the petitioner knew he was indicted, which would raise an entrapment defense. His trial attorney Boblick was ready to testify, but was not permitted to do this. Nor was he permitted to produce available

witnesses to establish the authenticity of the tape and registered letter through trustworthy testimony.

To exacerbate the matter further, however, the Trial Court and the prosecutor also effectively foreclosed using the People's informer, Fodderell to establish entrapment, since the prosecutor successfully combined with Fodderell's attorney (Mr. Schmuckler) that Fodderell could invoke the Fifth Amendment privilege, despite his role as informer, and police agent.

3 - The Trial Court read into the record a portion of Officer Williams' self-serving report, the thrust of which was that on July 6, 1973, Sapia sold a kilo of heroin to Fodderell. This was pure hearsay, and the Court conceded error. The damage was done.

4 - The Court charged the existence of a conspiracy which was not charged in either of the two indictments upon which the case proceeded, One Gardner, according to the testimony, was the main culprit and used Sapia as an agent, giving the best view the People can advance.* This in essence amended the indictment without approval of the grand jury.

5 - It was also conceded that Sgt. Rollo and others had interrogated the defendant-petitioner in jail, following his indictment and arrest, in the absence of his lawyer. It is not denied that the

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* Two indictments, one relating to June 27 and the other to July 6, 1973 were combined for trial. Neither alleged any conspiracy, nor acting in concert.

officers were aware that Sapia had a lawyer. The Court would not permit the defense to see the transcript or otherwise to learn of the nature of this improper interview. (The Rollo tape was Exhibit 20 for ident.). This chilled Sapia's desire to testify (*Harris v. New York*, 401 U. S. 222).

6 - The Trial Court moreover, permitted the unsworn tapes which included Fodderell's conversations to be considered, as evidence-in-chief, and thus permitted the jurors to predicate guilt on unsworn statements which were not subject to cross examination.

7 - The Trial Court refused to correctly charge on the law of circumstantial evidence, namely, that in order for the jury to consider such material, it had to be satisfied that the evidence excluded, to a moral certainty, every reasonable hypothosis, but that of guilt.

There are other errors, but the foregoing, we contend, are sufficient in this introductory to establish a need to grant certiorari.

ARGUMENT.

POINT I.

THE PROSECUTION'S CASE RELIED HEAVILY UPON THE HEARSAY UTTERANCES AND TAPE RECORDINGS OF CONVERSATIONS INVOLVING AN UNDERCOVER INFORMER, EARL FODDERELL, WHOM THE PROSECUTOR INCREDIBLY FAILED TO CALL AS HIS WITNESS. THE PETITIONER WAS SEVERELY PREJUDICED BY THE TRIAL JUDGE'S RULING THAT SAPIA COULD NOT COMPEL FODDERELL TO TESTIFY FOR THE DEFENSE IN THE FACE OF FODDERELL'S ASSERTION OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION, REJECTING PETITIONER'S CONTENTION THAT AS A COOPERATING INFORMER-AGENT, FODDERELL HAD NO BASIS FOR INVOKING THAT PRIVILEGE.

A. *The Trial Court below, realizing that the people had utilized Fodderell to its great advantage through the lips of police officers and tape recordings without risking his impeachment by preventing the defendant from confronting him in cross examination, implored the District Attorney to agree to grant Fodderell immunity in this case, which supplication the prosecutor scorned.*

B. *The petitioner maintains that by using Fodderell in an undercover capacity, there was no possibility of his incrimination since he was in the locus standi of a police officer who aided an arrest. The petitioner was therefore denied a*

Sixth Amendment right of cross examination (confrontation) as well as the right to compel witnesses in his behalf.

C. *Fodderell wanted to testify and TOLD THE COURT, out of the presence of the jury, that he had EXCULPATORY information and THAT SAPIA WAS INNOCENT, but insisted that he first be assured that the testimony he wanted to give would not be used against him by the District Attorney. This the court would not do.*

The defendant-petitioner was charged with very serious crimes, "A" felonies. The case rested in large measure upon an unsworn "witness," whose name was mentioned innumerable times, and whose voice was heard on tapes, and whose statements were repeated by police officers. This phantom was Earl Fodderell, an undercover informer, who was himself facing a prison term for a federal drug offense.

The People, obviously as a calculated trial stratagem, omitted to call Fodderell as a witness since they reaped great benefit from the use of his "testimony" through "unsworn" tape recordings, and hearsay references to his utterences via the lips of police officers.

The People therefore, effectively precluded any confrontation of this witness.

The Supreme Court of Delaware recently dealt with a surprisingly similar

situation and reversed a burglary-kidnapping conviction in an incisive opinion. While there was a statute involved, the Delaware Court made it clear that the result rested upon non-statutory grounds including "the practicalities of a fair criminal trial."

Thus, in *Keys v. State*, --Delaware--, Mar. 14, 1975, 337 A. 2d 18 (17 Cr. L. 2043), the Supreme Court of Delaware opined (*id.* at 21):

> "* * * We do not find it necessary to determine whether the admission of [Wells'] statements was error under the confrontation provision of the Sixth and Fourteenth Amendments of the United States Constitution [*Pointer v. Texas*, 380 U. S. 400 (1965)] because we find the admission violated the Statute itself and was therefore error. And we say so for two general reasons: the statutory language used by the General Assembly *and the practicalities of a fair criminal trial.*
>
> "In view of the fact that this statute represents a departure from the *common law rule that prior out-of-court statements are not admissible except for special purposes,* it should be strictly construed.

"We find that the Statute was not intended by the General Assembly to dispense *with the traditional requirement that the State produce the live testimony of the witness.* Moreover, we feel this interpretation is compelled by the statutory language."

The Court continued 337 A. 2d at 23 (17 Cr. L. 2044):

"We find a second general reason also compelling. The admission of out-of-court statements can have an impact on the practical ebb and flow of the criminal trial drama * * *"

"[In this case the trial court considered that Wells' presence at trial was sufficient and allowed the statements to be introduced through testimony of a police investigator and a prosecutor. In front of the jury the judge advised defense counsel that "Mr. Wells still remains in the courtroom subject to your cross examination if you desire to call him as a witness and cross examine him.]

"This scene dramatizes the chief issue in this appeal. The prosecution, instead of bearing the burden of sponsoring as a

witness the out-of-court declarant [who, for a while at least, appears to have been an accomplice and who had been granted immunity and whose testimony is thus doubly suspect], is able to present the out-of-court statement through an officer of the law and an officer of the Court. ([T]he Court refused to give the customary cautionary charge about accomplice testimony or the testimony of one granted immunity because '[i]t should be noted Mr. Wells was not a witness.') Additionally, the burden is shifted to the defendant to call the witness and it thus appears to the jury, regardless of technicalities of cross examination and formal vouching for the witness, that the defendant is sponsoring the witness or refusing to sponsor him. That burden is not fair. *If the State carried its position to its logical extreme, The State could rest its case without calling a single eyewitness to any pertinent fact.* That is not a trial as we know it. The State should not be able to rest its case without calling the witnesses it relies upon to prove it. This is particularly true when the State relies on witnesses who have obvious vulnerability as to credibility.

"We are unable to say that the error here was harmless or harmless beyond a reasonable doubt. Superior Court Criminal Rule 52; *Chapman v. California*, 386 U. S. 18." See, Point III, *supra*. (Emphasis ours.)

The concurring opinion of Chancellor Quillen explains the serious undermining of the hearsay rule and contrary holding would have (337 A. 2d at 24):

"*Concurrence*: First, I think it is important to attempt in capsule form to demonstrate for public understanding how the issue in this case is one of broad application and significance which could affect any citizen. It is important to do so because this case and others now pending on appeal, involving similar or related issues, concern criminal actions of some of the most serious crimes in our free society. I am keenly mindful of the seriousness of the allegations, from the state's point of view as well as the defendant's. *But the principle involved is also vital to the individual freedom of everyone. The decision is not based on an irrelevant technicality.* The average citizen accused of speeding would feel great resentment *if the State were permitted to*

prove its case through a single police witness who did not see the incident and who relied solely on what eyewitnesses told him. It would be unfair for the speeding defendant to have to defend against such an attack. The principle is no less valid in a serious case carrying a severe punishment."

See, *United States v. Allied Stevedoring Corp.*, 241 F. 2d 925, 933 (2d Cir. 1957), cert. denied 353 U. S. 984, 77 S. Ct. 1282, 1 L. Ed. 2d 1143 (1957).

"This Court has recognized the value to the fact finder of contradictions which were the consequence of live testimony. *Husband v. Wife*, Del Supr., 253 A. 2d 63 (1968). The Supreme Court of the United States has emphasized the importance of live testimony in factual determinations where credibility is a factor. *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474, 495, 71 S. Ct. 456, 468, 95 L. Ed. 456 (1951). Even the cases which hold that, given an adequate opportunity for cross examination, a physical confrontation of the witness before the defendant, Court and jury is not required by Confrontation Clause of the Sixth Amendment

emphasize the value 'of compelling (the witness) to stand face to face with jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' *Mattox v. United States*, 156 U. S. 237, 242-243, 15 S. Ct. 337, 339, 39 L. Ed. 409, 411 (1895); *Douglas v. Alabama*, 380 U. S. 415, 418, 85 S. Ct. 1074, 1077, 13 L. Ed. 2d 934, 937 (1965).

"The witness's presence before the tribunal is important because the demeanor while testifying will enable the trier of fact to better determine the worth of his testimony. See 5 Wigmore, *supra*, at 126. This is why the hearsay rule requires that the tribunal observe the witness testifying in order to receive his testimony. A witness's demeanor is part of his testimony * * *"

"Live testimony can give rise to contradictions and a demeanor which puts an entirely different light on the bare word. Such contradictions and such demeanor are properly the burden of the offering party. Indeed, some courts go so far as to say demeanor can be used to establish facts contrary to the words used by the witness."

See, *United States v. Arcuri*, C. A. 2d 403 F. 2d 491, cert. denied 394 U. S. 1003, and *United States v. Esteppe and Catino*, C. A. 2d 403 F. 2d 491, cert. denied 394 U. S. 1003.

That the confrontation clause requires an opportunity for cross examination is so obvious that it scarcely requires extended discussion.

In any adversary proceeding, litigants, generally have four basic rights: public trial, cross examination and confrontation, compulsory process, and assistance of counsel. The right to public trial is a safeguard against mendacity and incorrectness. *In re Oliver*, 333 U. S. 286 (1948); 6 Wigmore Evidence §1834 (3d Ed. 1940), and *United States v. Coplon*, 185 F. 2d 629, 639, 2d Cir. 1950.

The right of cross examination, "the greatest legal engine ever invented for the discovery of truth" insures that the eavesdropping agents' claims about the scope of their activities and the People's attorney's claim about the limits on disclosure are subject to testing by counsel for the defense, who alone has an interest in showing them up as ill-founded or mistaken (see *Alderman v. United States*, 394 U. S. 165 [1969]; *Douglas v. Alabama*, 380 U. S. 415 [1965]; *Pointer v. Texas*, 380 U. S. 400 [1965]; *Dennis v. United States*, 384 U. S. 855 [1966]; and 5 Wigmore Evidence, §1367 [3d Ed. 1940]).

It is not fanciful to argue herein that the defendant Sapia was *pro tanto* denied the assistance of counsel because

counsel was refused access to materials which may prove the difference between imprisonment and freedom. This analytically is cognate to denying counsel access to his client (see *Powell v. Alabama*, 287 U. S. 45, 57-58 [1932]). It also denies Sapia and his attorney "ample opportunity to acquaint himself with the facts." *Willis v. Hunter*, 166 F. 2d 721, 723 (10th Cir.), cert. denied 334 U. S. 848 (1948).

At this juncture, it may be appropriate to remind this Court that a tape was made of a post indictment interview of Sapia by the authorities in the absence of his retained attorney, while he was in custody. The prosecution and the Court refused to reveal this tape to appellant, and would not furnish a transcript or summary (882-897; 1478; People Exhibit 20 for ident.).*

In addition, the People had failed to reveal that there had been a hearing on the Sapia case where statements of People's witnesses had been uttered, but not furnished to the defense for cross examination. By the sheerest luck, Sapia learned of this (1509-1519; 1505).

If the State may insulate itself behind such epithets as "national security" or "confidential informant" or "no standing," then, of course, for all intents and purposes, the defendant is denied proper means of defending himself

* Numerals in parentheses refer to pages of the official Court Reporter's minutes of trial.

(see, Goldstein "The State and the Accused: Balance of Advantage in Criminal Procedure," 69 Yale L. J. 1149, 1175 [1960]).

This is a task for open hearing and not for summary procedures for the proof is surely in the hands of the State and "hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting System*, 368 U. S. 464, 473 (1962). See, *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620 (1944); *United States v. Coplon*, *supra*.

The Supreme Court has held in a related context that fundamental freedoms are not to be held out for sacrifice without full exploration of alternative means of dealing with the evils their exercise gives rise to. *United States v. Robel*, 389 U. S. 258 (1967).

The rationale of *United States v. Andolschek*, 142 F. 2d 503, 506 (2d Cir. 1944), cited with approval in *Dennis v. United States*, 384 U. S. 53 (1967), dictates that unless the government is willing to open its files to the extent necessary to insure, through adversary procedures in open court that its unlawful conduct did not produce leads or evidence which contributed to defendant's conviction, the case must be dismissed (see *Jencks v. United States*, 353 U. S. at 670, 672). Moreover, the claim that investigative files reflecting lawful techniques should be kept free from scrutiny would be more graciously received if experience showed that the government consistently and carefully separated illegally

gathered material from that legally gathered, to permit easy identification of the source of any given communication or item of intelligence.*

The Court's actions would seem to be wholly inconsistent with *Alderman v. United States, supra,* to say nothing of *Brady v. Maryland,* 373 U. S. 83. The defense was entitled to confront Fodderell under the Sixth Amendment. Such refusals have been held to be error of a grave nature; *Smith v. Illinois,* 390 U. S. 129, 131, 132; *Alford v. United States,* 282 U. S. 267.

The Sixth Amendment guarantees not only a right to be "confronted with the witnesses against him," but also "to have compulsory process for obtaining witnesses in his favor."

Fodderell was working in close association with the police. Officer Heyward, who acted in an undercover capacity, as well as Officer Bruno and others conceded that Fodderell was a certified undercover confidential informant who had even been assigned an official number (Bruno, 26, 96-98; Heyward, 476, 936).

Officer Bruno admitted that Sapia was mentioned to him by Fodderell and that is how Sapia came under investigation by him (21-26). Incidentally, Bruno had never seen Sapia carry anything (98).

* We refer to the revelations of the Ellsburg and Watergate cases.

Heyward met Fodderell on June 26, 1973 (476).

One Robert Gardner, who was apparently the chief culprit in the investigation seemed to give Sapia orders, and he too was linked into the case by Fodderell. In order to permit the hearsay utterances of Fodderell and Heyward and Gardner to be used against Sapia at times he was not said to be present, the prosecution, with the blessings of the Court concocted a "conspiracy" theory (486, 487). It is noteworthy that the Court itself conceded that there was no conspiracy charged in either indictment (1353-1360).

Just as a glaring example of the hearsay use of Fodderell's statements, it is appropriate to look at page 1062 of the record where the Court read a hearsay report of Officer Williams, quoting Fodderell when Sapia was not present:

> "On July 6, 1973, one kilo was purchased from Sapia * * * by undercover, UC 14547 [Fodderell]. First meeting was in the vicinity of Sapia's residence and the buy was transacted in the vicinity of 55 West 100th Street, 24th precinct."

At pages 1083 and 1084, the Court was told of the grave error it had committed, and admitted it was error. The jury was not informed that this was hearsay and

was not binding on Sapia. An instruction would exacerbate the situation.

The Court further ruled that it would admit any conversations involving Fodderell and Gardner (484-6). But the Court permitted conversations between Officer Heyward and Fodderell, even without the presence of either Gardner or petitioner (508; 648 tapes).

It was pointed out to the Court that if Fodderell was to have his statements admitted on the theory of his being a co-conspirator (a fact we reject), then there is a clear violation of *Bruton v. United States*, 391 U. S. 123, since it is the admissions of a non-testifying co-defendant or conspirator. Some conversations were post indictment, so the conspiracy had to have terminated by then (1355; 1354).

A perusal of the record reveals innumerable references to and conversations with, or statements of Fodderell.

Turning now to the grave error that was made by the Court and the prosecutor combining to preclude the defense from using Fodderell as a witness because of the implied threat by the District Attorney that he would be prosecuted if he so testified for the defense, we wish to quote some portions of the record.

Bear in mind, that Fodderell said that he could establish *"Sapia's innocence"* and that his testimony would be *exculpatory of Sapia*!

The prosecutor had no right to deny that Fodderell was not subject to prosecution for testimony about his role in this case. It is just as if Officer Heyward would have refused to testify on the grounds of self incrimination, even though everyone knew that he was an undercover agent and could not be involved since he was a police agent, and therefore could not have had any criminal intent.

A recent case decided by the United States Court of Appeals for the Second Circuit, *United States v. Anglada*, 18 Cr. L. 2144 (decided 10/16/75), confronted a similar issue to that of the case at bar wherein a witness-informer called to the stand invoked the Fifth Amendment. The Second Circuit held that some "carefully phrased, limited questions" would have been permissible. In remanding the case to the Court below, the Second Circuit cited the failure of the Trial Judge to submit the entrapment issue to the jury.

In *Anglada*, as in the case at bar, the defendant sought to obtain the testimony of one Santana, whom he called as a witness. The Court there also held a hearing outside the presence of the jury and learned that while Santana refused to be interviewed by defense counsel, he had nevertheless spoken freely to the prosecutor and the police about the events of the case. Santana's assigned counsel advised him to assert his Fifth Amendment privilege against self-incrimination. (Fodderell in the instant case followed similar advice from his assigned

counsel). The opinion of the Circuit Court treats the situation as follows:

> "Over defendant's objection, the judge sustained the privilege and excused Santana from testifying. Appellant claims that this ruling was erroneous considering the unique nature of Santana's testimony in establishing the entrapment defense (he was the only other participant in the crucial conversation), the protection afforded Santana against a criminal charge in the Anglada transaction because Santana was acting at the Government's request, the lack of connection between the Anglada sale and the state charge, the possible waiver of his Fifth Amendment rights by his conversations with the prosecutor, and the possibility that his reluctance to testify was based upon fear of Anglada's retaliation rather than on the Fifth Amendment.
>
> "The question thus posed is not a simple one. Such cases as *U. S. v. Domenech*, 476 F. 2d 1229, 1231 (2d Cir.), cert. denied, 414 U. S. 840 (1973); *U. S. v. Llanes*, 398 F. 2d 880, 884-85 (2d Cir. 1968), cert. denied, 393 U. S. 1032 (1969); and *U. S. v. Chandler*, 380 F. 2d 993, 997 (2d Cir. 1967),

> are not necessarily controlling. Only in *Llanes* was the reluctant witness asked to shed light on an entrapment issue, and, unlike this case, there was nothing to indicate that the witness had been a *police informer who had allegedly 'set up' the defendant*. As against the lesser showing there of the defendant's need for the evidence, the reluctant witness 'was himself under indictment for a narcotics violation which allegedly occurred at the same time and place as appellant's alleged violation,' which was 'a classical situation for the full exercise of the privilege.' 398 F. 2d at 884. In this case, there was no apparent connection between the state drug charge used to justify the privilege and the incident on which testimony was sought. It may be that on retrial the issue will be simpler since the state charge may already be disposed of. In any event, we suggest that if the situation arises again, the trial judge take a harder look at any blanket assertion of privilege and also at the possibility of allowing some carefully phrased, limited questions by Anglada's counsel." (Emphasis ours.)

It will therefore be noted that the Circuit Court would have permitted some

questioning, albeit limited. Moreover, since in the case at bar Fodderell was only to be questioned about the case on trial, there was no reason to exclude his testimony altogether since admittedly he had been a cooperating witness playing an undercover role for the police. He could not possibly have incriminated himself with respect to the charges on trial, as the dissenting opinion in the Appellate Division correctly observes. Thus the following quotations are important (1585-1586):

> "THE COURT: You understand you were brought here from West Street at the request of the counsel for Mr. Sapia as someone they wished to ask questions of as a witness in this case. Do you understand that? That's all I'm asking at this point.
>
> "THE WITNESS: [Fodderell] Yes, sir.
>
> "THE COURT: Now, Mr. Schmukler has told us he has spoken to you, and after talking to him you have indicated that if you were asked questions about your activities in connection with the matters that led to Mr. Sapia's arrest, that you would invoke a privilege against self-incrimination unless the Court granted you immunity from prosecution for the matters you will be talking about. That's what he told us.

> "Now I'm sure he was telling us in good faith what he thought your position was, but I want to know from you, is that your position?
>
> "THE WITNESS: Well, my position is that I don't know. I just tried to explain to him, *I hope I'll be able to speak freely. I don't want to see an innocent man go to jail for something he's totally not responsible for. Then on the other hand, I don't want to incriminate myself. I don't want to be prosecuted because I'm doing enough time.*"

The Court was deeply concerned with the dilemma posed by the Fodderell matter, but the prosecutor was adamant (1566-1567):

> "THE COURT: My preliminary reading of the appropriate section is to the effect the Court would not have the power to confer immunity without consent of the District Attorney's office.
>
> "As to what the testimony would be, I think it would be a fair summary that if believed by the jury, *would be exculpatory*. Whether or not the testimony had been indicated on the record on behalf of Mr. Fodderell, if called as a witness, he

would invoke the privilege against self-incrimination and your criminal practice act seems to indicate *the Court cannot confer immunity, although on the basis of what was told to me, if he invoked the privilege and I had that power, I would have done so.*

"Mr. Wilson indicated he did not feel the District Attorney should cooperate or consent to such granting of immunity. I believe that is your position still, Mr. Wilson?

"MR. WILSON: That is correct."

The Court then adverted to the same position taken by the chief of the division and expressed its sadness (1566-1567):

"THE COURT: I think it would be fair to add that I had a telephone conversation in Mr. Wilson's presence on my side of the phone with Mr. Rogers, in which I expressed the view that the District Attorney should consent to *immunity and Mr. Rogers disagreed and I don't* say that as a criticism of him, because I don't think it's that clear an issue from his standpoint, and on the basis of the information he has, but I think

it's fair to say that my belief is that it would be appropriate and helpful for the District Attorney to consent to immunity and *I am genuinely saddened* they would not do so."

The defense responded (1567-1568):

"MR. ANOLIK: I will have to express an exception on the record for several grounds.

"THE COURT: Yes.

"MR. ANOLIK: I think when the prosecution undertakes to use an individual as an informer and is even given a number as a police informer, and utilizing his evidence to get the indictments and to prosecute a defendant, and then it develops that that same informer has information which would be perhaps exculpatory to the defense, that the prosecution must, not may, but must grant immunity in the event the informer becomes a talisman, for the reason is that in that case, this is a witness who is not subject to examination through the tapes, that is, as being used against us by the prosecution to their advantage, and then they utilize their power, not given to a defendant, only to a prosecutor, to forestall and prevent

us from gleaning and developing exculpatory material or material which might show the informer or is under pressure or perjured himself or entrapped the defendant. We think it's a denial of the equal protection of the laws.

"I know it's a novel area, but I think under these unusual circumstances, that the prosecution has an ethical duty to grant immunity."

Mr. Anolik continued (1568):

"Now on the other aspect of it, I would ask the Court to consider the possibility, which I think is proper, that by becoming an informant and by assisting in the prosecution of this case, this individual, Mr. Fodderell, has waived his right against self-incrimination.

"He can't have it both ways, because in effect, he has already testified.

"THE COURT: I take it, if I may address you from the wall of the Court, Mr. Schmukler, you don't share the last opinion expressed, do you?

"MR. SCHMUKLER: No, I don't."

The Court agreed that the testimony of Fodderell, if believed, would be exculpatory (1570).

On 1572, the following occurred:

"MR. BOBICK: Anybody who says he can't have immunity. In this case, I say it's prosecutorial misconduct for the District Attorney's office to say to a man, go out and entrap somebody; go out and do something which you don't ordinarily do; go out and be a confidential informer and if somebody says to you, what's the truth of the matter, we will stop them from talking to you * * *.

"THE COURT: I believe the point you are making has some possible merit.

"MR. ANOLIK: The question must be broached. Whether or not they have the right -- they being the prosecution -- whether or not they have the right to use an informer and insulate him from cross examination by saying, don't worry, we won't give you immunity. You just get there and take the Fifth Amendment, so they can never cross examine you."

Regrettably, the People did not act fairly with the petitioner as is seen

from the foregoing and as will be demonstrated, *infra*, as well. The People should have volunteered the information that there had been a hearing at which statements of the People's witnesses were made before a federal Judge (Gagliardi). The prosecutor should have disclosed the tape and conversation that Sgt. Rollo had of a post-indictment, post-arrest interview with Sapia in the absence of counsel. To date, we still have not seen that.*

The District Attorney should have joined with the defendant in seeking the testimony of the crucial witness, Fodderell -- indeed, the prosecutor should have called him as its own witness initially *(Keys v. State, supra)*. Instead, the prosecution threw every conceivable roadblock in the way of adducing testimony from Fodderell and spurned the trial Judge's entreaties to remove the aura of prejudice by acknowledging that Fodderell would not be exposed to prosecution if he testified about this case. Again the District Attorney rejected the suggestion. We must remember the fact that Fodderell said that he had exculpatory evidence and would testify that Sapia was innocent of the charges. Yet by dint of questionable procedural barriers and ploys, he was kept from disclosing this information. In *Moore v. Illinois*, 408 U. S. 786, at 809-810, the Court ruled:

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* *Chambers v. Mississippi*, 410 U. S. 284; *United States v. Pacelli*, 491 F. 2d 1108, 1119; *United States v. Phinqst*, 477 F. 2d 177, 194-195.

"When the State possesses information that might well exonerate a defendant in a criminal case, it has an affirmative duty to disclose that information. While frivolous information and useless leads can be ignored, if evidence is clearly relevant and helpful to the defense, it must be disclosed.

"Obviously some burden is placed on the shoulders of the prosecutor when he is required to be responsible for those persons who are directly assisting him in bringing an accused to justice. But this burden is the essence of due process of law. It is the State that tries a man and it is the State that must insure that the trial is fair. 'A citizen has the right to expect fair dealing from his government, see *Vitarelli v. Seaton*, 359 U. S. 535, and this entails * * * treating the government as a unit rather than as an amalgam of separate entities.' *S & E Contractors, Inc. v. United States*, 406 U. S. 1, 10 (1972). 'The prosecutor's office is an entity and as such it is the spokesman for the Government.' *Giglio v. United States*, 405 U. S. 150, 154 (1972). See also *Santobello v. New York*, 404 U. S. 257, 262 (1971); *Barker v. Wingo*, 407 U. S. 514 (1972)."

In view of what transpired with respect to Fodderell and his prognostications that he would exculpate Sapia, we have no recourse but to assume that the People deliberately proferred false impressions and allowed incorrect evidence to be heard by the jury. Thus in *Brady v. Maryland*, 373 U. S. 83, 87, the Supreme Court said:

> "The Third Circuit in the *Baldi* case construed that statement in *Pyle v. Kansas* to mean that the 'suppression of evidence favorable' to the accused was itself sufficient to amount to a denial of due process. 195 F. 2d at 820. In *Napue v. Illinois*, 360 U. S. 264, 269, we extended the test formulated in *Mooney v. Holohan*, when we said: 'The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' And see *Alcorta v. Texas*, 355 U. S. 28' *Wilde v. Wyoming*, 362 U. S. 607. *Cf. Durley v. Mayo*, 351 U. S. 277, 285 (dissenting opinion).
>
> "We now hold that the suppression by the prosecution of evidence favorable to an accused *upon request* violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

> "The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile,' to use the words of the Court of Appeals. 226 Md., at 427, 174 A. 2d at 160."

In *Moore v. Illinois, supra*, the Supreme Court further cautioned (408 U. S. at 808):

"In my view, both *Brady v. Maryland*, 373 U. S. 83 (1963), and *Napue v. Illinois*, 360 U. S. 264 (1959), require that the conviction in this case be reversed. *Napue* established that the Fourteenth Amendment is violated 'when the State, although not soliciting false evidence, allows it to go uncorrected.' *Id.*, at 269. And *Brady* holds that suppression of material evidence requires a new trial 'irrespective of the good faith or bad faith of the prosecution.' *Supra*, at 87. There can be no doubt that there was suppression of evidence by the State and that the evidence that the State relied on was 'false' in the sense that it was incomplete and misleading."

In *Brady, supra*, the Court further ruled (373 U. S. at 86):

> "This ruling is an extension of *Mooney v. Holohan*, 294 U. S. 103, 112, where the Court ruled on what nondisclosure by a prosecutor violates due process:
>
> "'It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense

> of a trial which in truth is but used as a means of depriving a defendant of liberty *through a deliberate deception of court and jury by the presentation of testimony known to be perjured.* Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.'"

To make matters worse, the Trial Court would not permit the defense to call Fodderell to the stand in the presence of the jury, so that it could hear him invoke the Fifth Amendment. True, the Court explained this to the jury, but that is not the same as calling the witness, especially when the veniremen must have been wondering about Fodderell since his name was mentioned so often in testimony and the tapes.

The Fifth Amendment guarantees that:

> "No person * * * shall be compelled *in any criminal case* to be a witness against himself * * *."

It is apparent that the language of the Constitution *refers to an accused and not a witness.*

"Taken by themselves the words *nor can he be compelled to give evidence against himself* are, doubtless, broad enough to include a witness as well as an accused. But occurring in a sentence beginning with the words *in all capital or criminal prosecutions*, and sandwiched as they are between clauses which can only relate to the accused, they seem unmistakably intended to apply only to him: a conclusion which the word *he*, already used just a few words previously to refer unmistakably to the accused, strongly reinforces.

"* * * Quite clearly, had the framers of these provisions intended them to include the witness, the fact that the context might be construed as negativing such a construction would have been apparent to them; and they would have rewritten the provision to remove the ambiguity. One must conclude that the thought that the witness might be regarded as included never occurred to them. And the reason why it did not seems clear." Mayers, *Shall We Amend The Fifth Amendment* (1959) at 187.

In a footnote, the same author notes that the supposition that a "witness" as well as an accused is protected by

its terms is probably owing to a misunderstanding of the Amendment:

"It [the privilege against self-incrimination] was in fact unknown in the nineteenth century. It does not occur in either of the two historic Supreme Court decisions on the privilege toward the end of that century (the Boyd decision in 1886 and the Counselman decision in 1892). It does not occur in the 1891 edition of Story's *Commentaries on the Constitution* or in the 1893 edition of Greenleaf's *Evidence*--both standard works of the period."

Mayers, id. at 311, 312 footnote 16.

Arguendo, even if it be conceded that the privilege against self-incrimination protects witnesses, other serious questions are raised by the trial court's actions.

In *United States v. St. Pierre*, 132 F. 2d 837, 840 (C. A. 2, 1942), Judge Learned Hand observed:

"The result of using this, like any other privilege, is to deprive people of evidence which would be otherwise available; at best, a disastrous necessity, for disputes ought

> to be settled so far as they can by resort to the whole truth."

The privilege is designed and interpreted "to protect the innocent" even though it may prove "a shelter to the guilty." *Twining v. New Jersey*, 211 U. S. 78, 91 (1908).

Even if the witness had the privilege to invoke, the Trial Court committed egregious error in denying Sapia the right to put the questions to the witness *in the presence of the jury.*

Petitioner did not intend to, and could not, abuse the opportunity to question the witness despite his expressed intention to invoke the Fifth Amendment. He only sought permission to put questions to the witness.

The trial judge acted on the erroneous premise that the Fifth Amendment prohibits inquiry.

However, the Trial Court was plainly wrong. The witness was merely privileged not to answer them--as probative as they were. Actually, "except in the case of an *accused* in a criminal case [for an accused cannot be called as a witness, the privilege against self-incrimination] is merely an *option of refusal, not a prohibition of inquiry.*" 8 *Wigmore on Evidence* (3d Ed.) §2268, page 402.

> "The right to trial by jury includes the right to have the jury present when competent questions are propounded to a witness. While a witness may refuse to answer if the answer would tend to incriminate him, yet the privilege does not bar the asking of the question." *O'Chiato v. People*, 214 Pac. 404, 405 (Sup. Ct. Colo., 1923). See also, *Hinds v. John Hancock Mutual Life Ins. Co.*, 155 A. 2d 721, 723 (Maine, 1959).

In *United States v. Benjamin*, 120 F. 2d 521 (C. A. 2, 1941), it was held that a witness, as compared to an accused, does not have the constitutional privilege of refusing to take the witness stand, but only the privilege of declining to give answers, when interrogated. Judge Augustus N. Hand, writing for the Court stated (at 522):

> "It is to be remembered that the appellant has not the constitutional privilege to refuse to testify which belongs to a defendant on trial. He was subject to call as a witness to decline to give answers when interrogated which might tend to incriminate him. *O'Connell v. United States*, 2 Cir., 40 F. 2d 201, 205; *Mulloney v. United States*, 1 Cir., 79 F. 2d 566. As

Professor Wigmore has said, the privilege is 'an option of refusal and not a prohibition of inquiry.' Wigmore Evidence 2d Ed., §2268."

Accord:

United States v. Housing Foundation of America, 176 F. 2d 665 (C. A. 3, 1949);
O'Connell v. United States, 40 F. 2d 201, 205 (C. A. 2, 1930);
United States v. Miller, 80 F. Supp. 979, 981 (E. D. Pa., 1948).

The Sixth Amendment again met with disfavor at the hands of the trial Judge. He made empty defendant's right to "compulsory process for obtaining witnesses in his favor." If the Court were obliged to balance the privilege of the witness under the Fifth Amendment with Sapia's right to process for obtaining witnesses in his favor, guaranteed by the Sixth Amendment, it should have at least afforded petitioner a right to put questions to the witness in front of the jury. The Court still could have enforced the witness' right not to answer, provided he invoked the privilege.

By its action, the Trial Court also deprived Sapia of the right to inquire of the witness under oath whether his assertion of the Fifth Amendment privilege

was in good faith. Perhaps it was induced by others--perhaps the prosecutor.

See, too, *United States v. Gomez-Rojas*, F. 2d 16, Cr. L. 2451, decided February 10, 1975.

POINT II.

THE TRIAL COURT PRECLUDED THE DEFENSE FROM INTERPOSING AN ENTRAPMENT DEFENSE BY RULING THAT A TAPE RECORDING AND REGISTERED LETTER PREPARED ANTE LITAM MOTUM COULD NOT BE INTRODUCED: NOR COULD THE DEFENSE COUNSEL (MR. BOBICK) TESTIFY. FINALLY, THE COURT RULES THAT THE INFORMER FODDERELL COULD NOT BE MADE TO TESTIFY DESPITE HIS REVELATION THAT SAPIA WAS INNOCENT.

The testimony clearly revealed that the petitioner was brought into the case which ultimately resulted in his arrest, indictment, and conviction by an undercover confidential informer, Earl Fodderell.

There was a virtual dearth of evidence, except through Fodderell that Sapia was involved with narcotics. Gardner was apparently not apprehended, and in any event did not testify.

The Trial Court was told that the defendant wanted to interpose an entrapment defense and produced a tape recording and a self-mailed, unopened registered letter indicating that before he

was aware of an indictment, or that he would be arrested, the petitioner believed that Fodderell and perhaps others were "setting him up" (1375-1389). No bad faith was alleged by the Court which acknowledged that the tape and letter were not spurious. The Trial Court stated that they were hearsay (1392). This was error (*Chambers v. Mississippi, supra*).

The Trial Court would not even conduct a voir dire or allow Sapia to testify at such a voir dire (1396):

> "THE COURT: Entrapment is an affirmative defense.
>
> "MR. BOBICK: We stated in our option, we didn't use the word 'entrapment.' *We said from the very beginning that Fodderell was the owner of this narcotics, that Fodderell was the recipient of the money.*
>
> "THE COURT: I don't mean to cut you short. I think you and Mr. Anolik have ably expounded your views. I do not believe there is any merit.
>
> "MR. BOBICK: I think your Honor--*May we have a hearing, ex parte--a voir dire hearing out of the presence of the jury, put Mr. Sapia on the stand and let him testify.*
>
> "THE COURT: *You may not.*"

At 1419 of the record, defense counsel excepted:

> "MR. ANOLIK: Your Honor, we of course except to your Honor's ruling as we did, but I would just like to articulate for the record that we believe that your Honor is curtailing the defendant's rights to proceed with a proper defense. *One of the defenses he has been seeking to interpose is a defense of entrapment* under 40.05, I believe it is, of the penal law."

Defendant-petitioner Sapia maintains that he was the victim of entrapment.

> "Clearly entrapment is a facet of a broader problem. Along with illegal search and seizures, wiretapping, false arrest, illegal detention and the third degree, it is a type of lawless law enforcement. They all spring from common motivations. Each is condoned by the sinister sophism that the end, when dealing with known criminals or the criminal classes, justifies the employment of illegal means."

Donnelly, Judicial Control of Informants, Spies,

Stoolpigeons, and Agents Provocateurs, 60 Yale L. J. 1091, 1111 (1951).

Fodderell was used as an agent provocateur to entrap the defendant. Apparently he was sentenced to 12 years imprisonment by the federal Judge and was not hopeful of any benefits from the government or the State. Thus, it is understandable that the District Attorney wanted to stifle this witness who now apparently had no motive to lie to help himself. As a matter of fact, he would be more likely to be truthful in aiding the defendant, since Sapia could be of no help to him.

The error of the Trial Court is made obvious by a reading of *Washington v. Texas*, 388 U. S. 14 (1967), which held it to be a denial of a Sixth Amendment right to compulsory process to bar an accomplice no less an informer, from testifying on behalf of a defendant. The Supreme Court explained:

> "The rule disqualifying an alleged accomplice from testifying on behalf of the defendant cannot even be defended on the ground that it rationally sets apart a group of persons who are particularly likely to commit perjury. The *absurdity of the rule* is amply demonstrated by the exceptions that have been made to it. For example, the accused accomplice may be

> called by the prosecution to testify against the defendant. Common sense would suggest that he often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still awaiting his own trial or sentencing."

Since Fodderell was an informer, he did not participate as an "accomplice" and had no privilege against self-incrimination.

POINT III.

ALTHOUGH THERE WAS NO CONSPIRACY CHARGED NOR ANY ALLEGATION OF ACTING IN CONCERT, THE COURT IN ESSENCE JUDICIALLY AMENDED THE INDICTMENT TO THE SURPRISE AND PREJUDICE OF SAPIA, BY RULING THAT SAPIA WAS PART OF AN UNCHARGED CONSPIRACY WITH GARDNER. THIS WAS AN ERROR OF CONSTITUTIONAL DIMENSION (FIFTH AND FOURTEENTH AMENDMENTS).

There were two indictments, both charging sales of narcotics. There was admittedly no allegation of conspiracy or acting in concert. Yet, the Court in essence judicially amended the indictments to permit the prosecutor to proceed on a conspiracy theory, so that evidence, otherwise inadmissible, would be allowed (486):

"THE COURT: *The statements inferred by the witness of a criminal conspiracy are binding on all the conspirators even if the conspiracy is not alleged in the indictment.* In regard to the people who are not established in the conspiracy at the time the statements are made, if by their actions they adopt the conspiracy, make themselves parties to it, they are equally bound by statements to it or to which they subsequently express their adherence and that rule does not involve any requirement of a charge in the indictment of acting in concert.

"MR. BOBICK: There is only one defendant on trial here.

"MR. WILSON: It doesn't make a difference.

"MR. BOBICK: You are claiming you can have a conspiracy by one?"

The Court admitted it presented an appellate issue:

"THE COURT: I believe conceivably with regard to the 26th, my ruling may be, leave you in the event of a conviction, with an *interesting issue on appeal*, but if he presses

it, I have to rule on the law as I understand it.

"MR. BOBICK: Of course. It is understood I would object to it. I don't have to object to it when he introduces it. I object to it at this point.

"THE COURT: You have *an ongoing objection to all conversations in which your defendant was not a participant.* I am not encouraging you to pursue this. I am not convinced that from the appropriate standpoint, that is helpful to your case, but I believe the basic legal priciples are clear, in the event there was ultimately an adherence to the basic agreement by the defendant in the case that all statements made in furtherance of it even before he became adherent to it are admissible against him."

Where a single defendant stands convicted of a conspiracy, the verdict is contrary to law (*United States v. Suba*, 227 F. Supp. 445); see also, *United States v. Hysohian*, 448 F. 2d 343; *United States v. Austin-Bagley Corp.*, 31 F. 2d 229.

The conspiracy addendum opens the floodgates for hearsay evidence at trial. The People extensively uses various means to gather statements by various participants in the alleged transgression of law. We have seen in the case at bar what

lengths the prosecution went to get statements or at least some conversations, between Sapia and Heyward by setting up a "straw man" in the figure of Fodderell to coax and cajole and entice Sapia into having a conversation with him concerning the case.

Thus, evidence ordinarily receivable only against a particular individual, is made binding upon all of the alleged co-conspirators by virtue of the inclusion of a conspiracy count."

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* *See Developments in the Law--Criminal Conspiracy*, 72 Har. L. Rev. 920, 923 (1959), where one legal commentator has addressed himself to this very problem:

> "By means of evidence inadmissable under usual rules the prosecutor can implicate the defendant not only in the conspiracy itself but also in the substantive crimes of his alleged co-conspirators. In a large conspiracy trial the effect produced upon the jury by the introduction of evidence against some defendants may result in conviction for all of them, so that the fate of each may depend not on the merits of his own case but rather on his success in disassociating himself from his co-defendants in the minds of the jury."

See also *United States v. Falcone*, 109 F. 2d 579, 581 (2d Cir. 1940), aff'd 311 U. S. 205 (1940); Note, *The Conspiracy Dilemma; Prosecution of Group Crime or Protection of Individual Defendants*, 62 Harv. L. Rev. 276, 277 (1948).

In *Krulewitch v. United States*, *supra*, Justice Jackson, after a survey and criticism of the federal law of conspiracy declared (336 U. S. at 457):

> "There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evil doers. But statutes authorize prosecution for substantive crimes for most evil-doing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges * * * and I think there should be no straining to uphold any conspiracy conviction where [as herein] the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction."

In *Glasser v. United States*, 315 U. S. 60, 75, 76 (1942), the Supreme Court explained:

> "In conspiracy cases * * * liberal rules of evidence and wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant * * *"

As a practical matter, the jury does not distinguish between the separate defendants' cases when conspiracy has been charged. The indiscriminating jury deliberations in cases like these are the real motivation for the adding of a separate conspiracy charge to a substantive crime which includes conspiracy as one of its elements. This Court is thus given another opportunity to express its displeasure and disagreement with this ever-mushrooming prosecutorial practice. Prosecutors must be told, once and for all, that our system of criminal justice does not tolerate such unfair tactics.

There is no question but that the use of an uncharged conspiracy count permitted the introduction of evidence otherwise inadmissible.

In *United States v. Falcone*, 109 F. 2d 579 (2d Cir. 1940), aff'd 311 U. S. 205 (1940), Judge Learned Hand of this Court aptly declared (*id.* 581):

> "* * * Today when so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders * * * there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided."

We think it is appropriate for this Court to consider the recent decision in *United States v. Hysohion* (2d Cir. 1971), 448 F. 2d 343 at 247, where that Court explained:

> "We hold that this finding so jeopardizes Rimbaud's conviction on the conspiracy count as to require us to order his acquittal on that count also. We think that the district court's finding that Rimbaud was no more than 'a mere *casual facilitator*' negates the court's finding that Rimbaud conspired to facilitate the Roupinian-Everett sale. While it is true that one co-conspirator need not actually personally deal in or custodially possess the narcotics themselves, the Government must prove an 'unlawful agreement and an overt act committed in pursuance of the agreement.' *United States v. Agueci*, 310 F. 2d 817, 828 (2d Cir. 1962), cert. denied; *Guippone v. United States*, 372 U. S. 959, 83 S. Ct. 1013, 10 L. Ed. 2d 11 (1963). We find no evidence in the record and nothing in the findings below which would support the existence of an unlawful agreement. The fact that Rimbaud told Everett, a willing buyer, how to make contact with a willing seller does not necessarily

imply that there was an agreement between that seller, who was Roupinian, and Rimbaud."

In *United States v. Peoni*, 100 F. 2d 401, 403 (2d Cir. 1938), Judge Learned Hand explained:

"Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it."

In *United States v. Andolscheck*, 142 F. 2d 503, 507 (2d Cir. 1944), this Court further elucidated:

"It is true that at times courts have spoken as though, if A makes a criminal agreement with B, he becomes a party to any conspiracy into which B may enter, or may have entered, with third persons. *That is of course an error*; the scope of the agreement actually made always measures the conspiracy, and the fact that B engages in a conspiracy with others is as irrelevant as that he engages in any other crime." (Emphasis added.)

Paradoxically, the Trial Court conceded that there was no charge of conspiracy and none of acting in concert. Yet, it refused to dismiss (1353):

"MR. ANOLIK: I'd also like to point out your Honor there were tapes, having been here and also having read a record, your Honor, there were tapes that contained references to and articulation of conversations with Earl Fodderell. There was no testimony by Earl Fodderell in the People's presentation your Honor.

"Now, we are moving to dismiss on that basis as well because we consider that even though they allege, they allege that this was something that occurred, I suppose, in a conspiratorial vein, although it is my understanding from the indictment *there is no conspiracy count in the indictment.*

"THE COURT: *That's true.*

"MR. ANOLIK: *And there is no acting in concert allegation.*

"THE COURT: *That's also true.*"

The Fifth Amendment of the United States Constitution precludes any charge for a felony, except upon an indictment of a Grand Jury.

A person can be charged and tried only upon the indictment in a felony case and especially solely upon the language found in the charging part of the instrument (*Sirone v. United States*, 361 U. S. 212, wherein a variation between pleading and proof was held to have deprived the petitioner of his right to be tried only upon the charges set forth in the indictment).

A change in the indictment without action of a grand jury, deprives the court of jurisdiction to try the case (*Ex Parte Bain*, 121 U. S. 1, 12).

It is to be noted that where a verdict may be based upon more than one theory, one of which may be invalid under the Constitution, the judgment must be reversed (*Williams v. North Carolina*, 317 U. S. 287, 292). (See, too, *Cole v. Arkansas*, 333 U. S. 196, 202).

Basic to the very idea of free government and among the immutable principles of justice which no State of the Union may disregard, is the necessity of due *"notice of the charge and an adequate opportunity to be heard in defense of it."* (*Powell v. Alabama*, 287 U. S. 45, 68; and *Snyder v. Massachusetts*, 291 U. S. 97, 105).

The whole case smacks of *"trial by ambush"* (*United States v. Baum*, 482 F. 2d 1325--2d Cir. 1973). This was true with respect to Fodderell, the defense of entrapment, the use of hearsay tapes against petitioner, and the uncharged conspiracy "count."

POINT IV.

OTHER ERRORS: (A) THE PEOPLE, VIA SGT. ROLLO INTERROGATED PETITIONER AFTER ARREST AND INDICTMENT IN THE ABSENCE OF RETAINED COUNSEL AND REFUSED TO DISCLOSE THE CONTENTS OF THE TAPE. THIS WAS A VIOLATION OF *MASSIAH v. UNITED STATES* AND *SPANO v. NEW YORK*. IT ALSO HAD A CHILLING EFFECT ON SAPIA'S TAKING THE STAND AS THE REMARKS MIGHT BE USED IN CROSS EXAMINATION (*HARRIS v. NEW YORK*).

(B) THE TRIAL COURT CHARGED INCORRECTLY BY REFUSING TO CHARGE THAT IN ORDER TO USE CIRCUMSTANTIAL EVIDENCE, THE JURY MUST ELIMINATE TO A MORAL CERTAINTY EVERY REASONABLE HYPOTHESIS, BUT THAT OF GUILT.

The People concededly interrogated Sapia after his arrest and indictment, in the absence of his retained counsel while he was in custody. The People and the Trial Court refused to permit the petitioner or his counsel to hear a tape that was made thereof, or to otherwise learn of its contents (882-891).

This was a violation of *Massiah v. United States*, 377 U. S. 201, and *Spano v. New York*, 360 U. S. 315.

Since the evidence might be used for impeachment on cross examination should Sapia take the stand, it cast a chilling effect on his option to testify (*Harris v. New York*, 401 U. S. 222; *Walder v. United States*, 347 U. S. 62).

The Trial Court was advised that it had not charged correctly on circumstantial evidence (1850). The Court refused to correct the charge by telling the jury, as requested that the jury might not use circumstantial evidence unless they eliminated to a moral certainty every reasonable hypothesis but that of guilt (*People v. Cleaque*, 22 N. Y. 2d 363; *People v. Taddio*, 292 N. Y. 488; *People v. Kennedy*, 32 N. Y. 141, 145, 146; and *People v. Harris*, 136 N. Y. 423, 429).

CONCLUSION.

The petition for certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK,
Attorney for Petitioner.

APPENDIX.

ORDER OF APPELLATE DIVISION.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on July 15, 1975.

PRESENT: HON. HAROLD A. STEVENS, Presiding Justice,

HON. FRANCIS T. MURPHY, JR.,
HON. VINCENT A. LUPIANO,
HON. MYLES J. LANE,
HON. EMILIO NUNEZ, Justices.

- X

782

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

JOSEPH SAPIA,

Defendant-Appellant.

- X

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Sandler, J.), rendered on November 14, 1974, and said appeal having been

argued by Mr. Irving Anolik, of counsel for the appellant, and by Mr. Robert K. Hood, of counsel for the respondent; and due deliberation having been had thereon, and upon the opinion of this Court filed herein

It is ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed. (Murphy, J., dissents in an Opinion.)

ENTER:

HYMAN W. GAMSO
Clerk

OPINION OF THE APPELLATE DIVISION.

SUPREME COURT, APPELLATE DIVISION,

FIRST DEPARTMENT, JUNE 1975.

HAROLD A. STEVENS, P.J.,

FRANCIS T. MURPHY, JR.,
VINCENT A. LUPIANO,
MYLES J. LANE,
EMILIO NUNEZ, JJ.

- X

782

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

JOSEPH SAPIA,

Defendant-Appellant.

- X

Appeal from a judgment of the Supreme Court, New York County (Sandler, J. and a jury), rendered November 14, 1974, convicting defendant of Criminally Selling a Dangerous Drug in the First Degree (former Penal Law Sec. 220.40) and Criminally Selling a Dangerous Drug in the Third Degree (former Penal Law Sec. 220.30).

Irving Anolik, attorney for defendant-appellant.

Robert K. Hood of counsel (Peter L. Zimroth with him on the brief; Robert M. Morgenthau, District Attorney) for respondent.

LANE, J.:

Joseph Sapia was convicted after a jury trial of criminally selling a dangerous drug in the first degree and criminally selling a dangerous drug in the third degree. The charges arose from two separate transactions: one on June 27, 1973, resulting in the sale by defendant of four ounces of heroin, and the second taking place on July 6, 1973, resulting in the sale by defendant of one kilo of heroin.

The sales were made to an undercover police officer who was closely monitored by his backup team. The closely coordinated police work included the taking of tape recordings and videotaping, which resulted in the submission for the consideration of the jury of a case overwhelmingly proving the guilty participation of the defendant.

Defendant, however, urges that he was prejudiced in the presentation of his case by his inability to call an undercover informant to testify, which inability constitutes reversible error.

The initial contact by undercover Police Officer Hayward was made through Earl Fodderell, who was known to the

police as a major narcotics dealer. Fodderell, already under Federal indictment, acted as an agent of the police and arranged for Hayward to meet one Robert Gardner, who ultimately arranged for the meeting with Sapia.

Fodderell's only other connection with the case, as presented to the jury, was his making a telephone call to the defendant to arrange for a new meeting. This was because the initial four-ounce sale was scheduled to be made on June 26. When that meeting was aborted due to defendant's failure to appear on time, a new meeting had to be arranged.

Fodderell, who was in a Federal prison at the time of this trial, had been brought to court as a potential defense witness. He was interviewed in chambers by the Trial Justice without the presence of defense counsel or the D. A. The court then expressed its opinion that Fodderell's testimony might be beneficial to the defense. However, Fodderell, who had already been sentenced in Federal Court to a 12-year term of imprisonment and had an additional Federal indictment pending, declined to testify unless granted immunity, which immunity the D. A. refused to confer.

The court then informed the jury that Fodderell was available but that he refused to testify, claiming his constitutional right to remain silent.

Defense counsel attempted to introduce alleged exculpatory statements tending to show a defense of entrapment via

an interview held between defendant and his attorney. That interview took place after the narcotics sale but before the arrest. The court properly denied the admissibility of those statements since they clearly were self-serving.

My dissenting brother finds it questionable whether Fodderell can claim Fifth Amendment immunity and, furthermore, whether the failure of the D. A. to confer immunity warrants reversal of the conviction.

It is to be noted that an agent of a governmental authority, when questioned about occurrences related to his official duty, has the right to claim his Fifth Amendment privilege (*Gardner v. Broderick*, 392 U. S. 273; *Spevack v. Klein*, 385 U. S. 511; *Malloy v. Hogan*, 378 U. S. 1). The right to assert this privilege is, as Mr. Justice Brennan stated in *Malloy v. Hogan* (378 U. S. 1, 8):

> "[T]he right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty * * * for such silence."

A penalty in the context of that statement means imposition of any sanction which makes assertions of the Fifth Amendment privileges "costly" (*Spevack v. Klein*, 385 U. S. 511, 515). Therefore, in the context of the case at bar, Fodderell, though acting as an informer for the

police, did not lose his right to claim his Fifth Amendment privilege. Indeed, two immediate reasons for his invoking the privilege come to mind: It is possible that, while Fodderell was performing his duties on behalf of the police, he at the same time, and intertwined in the same transaction, performed acts which were of a criminal nature and which were unauthorized to be performed. He has a right to protect himself against prosecution because of his performance of those acts. In addition, Fodderell had already testified in Federal Court regarding this transaction. Defense counsel conceded on the record that the testimony Fodderell would give at the trial was substantially different from the testimony already given in Federal Court. He would therefore be exposing himself to a possible perjury indictment which even a grant of transactional immunity, requested by the D. A. and conferred by the court, could not prevent (CPL, §§ 50.30; 50.10[1]).

However, the mere right of a witness to assert his Fifth Amendment privilege does not reach the question as to whether defendant was able nonetheless to get a fair trial. We have nothing in the record other than conjecture as to what testimony Fodderell would give had he been granted immunity.

The court, after an in camera interview alone with Fodderell, stated:

> "As to what the testimony would be, I think it would be a

fair summary that if believed by the jury, would be exculpatory. Whether or not the testimony would be completely exculpatory if believed by the jury, is by no means clear to me at this point. I am not at all clear the attorneys who have spoken to him, his attorneys, have a sufficiently detailed understanding of all the aspects of it, lead me to form an opinion on that, but there is no question at all it would, at least in part, be exculpatory, would be material evidence in the case, and evidence that a jury ought to hear."

The court later stated:

> "I'm not persuaded that if every word he were to say would be believed, it would constitute a complete defense in the case, nor as a factual matter, would avoid a conviction, but it might."

Clearly, the court felt that further probing by defense counsel would reveal the true value of Fodderell's testimony. Such probing by defense counsel took place and they found his statements at the interview to be "wholly inconsistent" with statements he made to the Federal Government.

The defense made no offer of proof which would have clearly delineated the parameters of the testimony to be elicited from Fodderell and would have indicated whether or not there could be an evidentiary articulation of the defense of entrapment.

Despite the fact that the prosecution requested defense counsel to make an offer of proof, none was forthcoming. The court's estimate of the exculpatory nature of the testimony was, as stated by the court, subject to in-depth interview by counsel with greater knowledge of the background facts. Counsel conceded that the gross inconsistency between Fodderell's proposed testimony at trial (which proposed testimony they did not outline) and the statement given in Federal Court could well subject Fodderell to a perjury indictment and, on that basis, they rejected calling him unless he were granted immunity.

In view of the overwhelming evidence against defendant and in view of the conjectural nature of the missing testimony, we cannot hold that the failure to grant immunity constituted reversible error.

This is especially true since there was no affirmative duty upon the prosecution to call Fodderell as a witness. He did not participate in the sale itself, nor did he act to identify the defendant (*cf. People v. Goggins*, 34 N. Y. 2d 163). The People's duty was fulfilled when Fodderell's identity was made known and he was made physically available to the

defense (*U. S. v. LaCouture*, 495 F. 2d 1237, cert. den., U. S. , 95 S. Ct. 631; *People v. Goggins*, 34 N. Y. 2d 163).

The D. A. expressed no knowledge of exculpatory statements and, absent an offer of proof, could not formulate their validity or for that matter their existence. Absent knowledge of specific exculpatory material or a specific source of such material, the People have no duty to grant immunity based on speculation and conjecture as a pseudo-fulfillment of the rule prohibiting suppression of "evidence favorable to an accused" (*cf. Brady v. Maryland*, 373 U. S. 83, 87).

Accordingly, the judgment of the Supreme Court, New York County, convicting the defendant after jury trial of the crimes of criminal sale of a dangerous drug in the first degree and criminal sale of a dangerous drug in the third degree, should be affirmed.

All concur except Murphy, J., who dissents in a dissenting opinion.

DISSENTING OPINION OF MURPHY, J.

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Murphy, J. (dissenting)

I cannot vote to affirm the instant conviction, carrying with it a prison sentence of 15 years to life, in view of the Trial Judge's candid concession that exculpatory testimony was being withheld from the jury.

Earl Fodderell, reputed to be one of the ten largest distributors of narcotics in New York City, decided to cooperate with local police officers after pleading guilty to federal charges; and was eventually "registered" as a confidential informant. Though Fodderell received no money for his subsequent services, the fact of his cooperation was brought to the attention of the sentencing judge in his federal case.

Fodderell's disclosures involved defendant Sapia and an individual named Gardner, all of whom shared the same Bronx residence address. Through Gardner, undercover Officer Hayward met defendant and, on two separate occasions, purchased from him a substantial sum of narcotics for approximately $40,000.

Defendant's involvement in these sales is undisputed. Aside from the "live" testimony of the undercover officer and his back-up team, tape recordings and videotapes were introduced into

evidence clearly establishing defendant's "guilt." My only concern is whether defendant was improperly precluded from establishing a viable entrapment defense.

Although tape recordings of conversations with Fodderell were introduced as evidence-in-chief, he was not called as a prosecution witness. Appellant's contention that the People were required to call Fodderell as a witness in order to permit confrontation and cross examination is not persuasive. Fodderell's role in the investigation which led to defendant's (and Gardner's) arrest was limited. His information initiated the inquiry; and he introduced the undercover officer to the potential source of drugs. Under the circumstances of this case, I would agree with respondent that, except to the extent hereinbelow indicated, its constitutional obligations were met when Fodderell's identity was disclosed.

However, the inability of the defense to obtain Fodderell's testimony presents a much different situation.

Entrapment is an affirmative defense. (CPL § 40.05.) Defendant initially attempted, unsuccessfully, to interpose such defense through the introduction of a pre-arrest (but post-sales) tape recording of a conversation between himself and his attorney in which it was allegedly claimed that Fodderell provided the narcotics sold to the undercover officer and was the recipient of the proceeds of such sales. The trial judge ruled this evidence inadmissible and suggested that Fodderell be called as a defense witness.

Defense counsel opposed the suggestion; but reconsidered after the court adhered to its ruling on the proffered tape.

Fodderell was interviewed by defense counsel at the Federal House of Detention (where he was serving a 12-year sentence on federal drug charges, awaiting determination of a resentence application predicated on his police cooperation and disposition of other pending charges). After the interview, he was brought to court with his attorney who stated that his client would invoke his privilege against self-incrimination and refuse to answer all material questions unless granted immunity.

After an *in camera* discussion with Fodderell's lawyer, the Trial Judge summarized Fodderell's potential testimony "if believed by the jury, [as] exculpatory;" and declared that he would have granted the witness immunity, in the event the privilege was invoked, if he had the power to do so. The prosecutor, however, despite the court's telephone call to the trial assistant's superior, refused to expressly request the conferring of immunity (CPL, §50.30); a decision which "genuinely" "saddened" the court.

An obviously still disturbed and dissatisfied Trial Justice put Fodderell on the stand, outside the presence of the jury, and asked him to state his position with respect to answering questions concerning his activities in the instant case. Fodderell responded:

> "Well, my position is that I don't know. I just tried to explain to him, I hope I'll be able to speak freely. *I don't want to see an innocent man go to jail for something he's totally not responsible for.* Then on the other hand, I don't want to incriminate myself. I don't want to be prosecuted because I'm doing enough time." (Emphasis added.)

Fodderell vacillated between testifying and not testifying, finally deciding not to become a witness; apparently concerned because a statement given in federal court might expose him to a perjury conviction.

Although it does not conclusively so appear in the record, the Trial Judge clearly indicated that Fodderell's proposed testimony would have been relevant to an entrapment defense. Even under the "subjective" theory of entrapment (depending on whether Sapia had the requisite predisposition to commit the crimes), a factual issue was presented which requires a jury determination. (See *United States v. Russell*, 411 U. S. 423.) The District Attorney's speculations to the contrary notwithstanding, we can only conjecture as to the verdict if, for example, it was disclosed that Fodderell gave Sapia the drugs which were then passed on to Hayward and received all of the money paid by the undercover officer.

Equally devoid of merit, in my view, are respondent's surmises as to the heretofore undiscovered crimes possibly committed by Fodderell which will escape prosecution if he is given transactional immunity. (CPL, § 50.10.) No amount of guesswork should be permitted to deprive a defendant sentenced to a 15-year-to-life prison term of a fair trial. In the circumstances of this case, assuming Fodderell could invoke his Fifth Amendment privilege (which is somewhat questionable since he was cooperating with the police and lacked the criminal intent necessary to commit the instant crimes), the refusal of the prosecutor to request immunity for Fodderell effectively deprived defendant of his Sixth Amendment right to have compulsory process for obtaining witnesses in his behalf. It seems to me that respondent's fear of Fodderell's disclosure of unrelated crimes, thereby obtaining complete absolution, if legally or factually valid, could have been dispelled by appropriate agreement or stipulation framing the questions to be asked and limiting them to these transactions. A right sense of justice required no less.

Additionally, I believe the court's refusal to allow defense counsel to hear a tape recording of defendant's post-indictment interview by the police was prejudicial error.

Defendant was concededly interrogated after arrest and indictment, in the absence of his retained counsel. The interview was for the purported purpose

of enlisting his cooperation in an assertedly unrelated matter. Although the trial judge, who heard the tape, concluded that it had no bearing on the instant case, a transcript thereof should have been furnished defense counsel. Though the information disclosed was apparently not used as evidence against defendant (*Massiah v. United States*, 377 U. S. 201), any disclosure obtained could have been used to impeach defendant and thus could have had a chilling effect on his option to testify in his own behalf. (*cf. Harris v. New York*, 401 U. S. 222.)

In light of the foregoing, defendant's conviction should be reversed and a new trial directed.

ORDER OF THE COURT OF APPEALS.

STATE OF NEW YORK,

COURT OF APPEALS.

- X

1 No. 548

THE PEOPLE &c.,

Respondent,

vs.

JOSEPH SAPIA,

Appellant.

- X

Irving Anolik, N. Y. C., for appellant.

Robert M. Morgenthau, D. A., N. Y. County (David I. Pincus & Peter L. Zimroth of counsel) for respondent.

The order of the Appellate Division should be affirmed.

Order affirmed.

Opinion by Jones, J.

All concur.

Decided December 28, 1976.

OPINION OF THE COURT OF APPEALS.

STATE OF NEW YORK,

COURT OF APPEALS.

- X

1 No. 548

THE PEOPLE &c.,

Respondent,

vs.

JOSEPH SAPIA,

Appellant.

- X

Irving Anolik, N. Y. C., for appellant.

Robert M. Morgenthau, D. A., N. Y. County (David I. Pincus & Peter L. Zimroth of counsel) for respondent.

JONES, J.:

With respect to the principal issue tendered on this appeal we hold that in the circumstances of this case the prosecution had no obligation, after identifying and producing an informer, to grant him immunity when, in the exercise of his

privilege against self-incrimination, the informer refused to give what, assumedly, would have been exculpatory testimony.

Earl Fodderell was one of several persons arrested and indicted on federal charges arising out of an extensive, cooperative drug investigation conducted by local and federal law enforcement officers. After Fodderell, reputedly a large narcotics distributor in New York City, had pleaded to the federal charges, he indicated his willingness to cooperate with the New York City police in further investigations and was registered as a confidential informer. In consequence of disclosures by Fodderell, police attention was focused on defendant and plans were made for his apprehension. Fodderell participated in the formulation of plans for a purchase from defendant. He introduced the undercover officer to one Gardner, a friend of defendant destined to be the intermediary, and assisted in arranging a first appointment which was never kept by defendant. Fodderell again was active in setting up a second meeting between the undercover officer and defendant on June 27, 1973 at which both Fodderell and Gardner were present. The purchase money, together with a payment for Gardner's services, was handed to Gardner and the details of a transfer from defendant were worked out. Fodderell apparently was an eyewitness to the sale at that time by defendant to the undercover officer of four ounces of heroin. Defendant made another sale to the same undercover officer on July 6, 1973, this time of one kilo of heroin. While this sale, too,

could be attributed to Fodderell's earlier cooperation, it does not appear that he had any direct part in arranging it, nor was he a witness to its execution.

At his trial, defendant sought to interpose the defense of entrapment. During the course of lengthy arguments incident to adverse rulings as to the admissibility of evidence offered by defendant in support of such defense, the trial court suggested that defendant call Fodderell to give testimony concerning his claim. After initially opposing this suggestion, and particularly because of the court's exclusion of other evidence, the defense decided to interview Fodderell who was then serving a 12-year sentence on the federal drug charges. After an initial interview, defense counsel requested that Fodderell be brought to court. The prospective witness appeared with his attorney who stated that Fodderell would invoke his privilege against self-incrimination and refuse to testify unless granted immunity.

After an *in camera* discussion with Fodderell's attorney out of the presence both of defense counsel and of the prosecutor and without disclosing the nature or particulars of Fodderell's prospective testimony, the trial judge concluded that, if believed, the testimony would be exculpatory and constituted material evidence which the jury should hear. The prosecution declined the trial court's repeated suggestion that the witness be granted immunity (CPL, § 50.30). Fodderell's attorney thereupon reported that his client refused to be interviewed further by the defense.

The trial judge apparently was not satisfied with the representations of Fodderell's attorney in this regard, and accordingly Fodderell was himself called to the witness stand out of the presence of the jury. Following discussion of the situation with the court, Fodderell agreed to confer further with defense counsel. After such conference defense counsel became less than enthusiastic to call the witness, conceding some weaknesses in the prospective testimony.

The following day the dilemma was resolved. On advice of his counsel Fodderell informed the court that he had reconsidered his predicament and would invoke his privilege against self-incrimination. The prosecution restated his opposition to any grant of immunity. The defense requested permission to call Fodderell to the stand, to ask questions and to require the witness to exercise his constitutional privilege in the presence of the jury. This request was denied, but the court did instruct the jury that Fodderell had been called as a defense witness and in its absence had invoked his privilege against self-incrimination. The jury was advised not to speculate about the reasons for Fodderell's exercise of his constitutional rights, and the Fodderell chapter was closed.

Defendant now advances several grounds for reversal of his conviction by the jury. Principally his contentions revolve around Fodderell. First, it is asserted that defendant was prejudiced by the People's failure to call Fodderell, so

frequently and importantly referred to in the People's proof, as a prosecution witness, which effectively denied defendant his constitutional right of confrontation. We know of no instance, however, in which court has dictated to a prosecutor whom he shall call to the witness stand. (Clearly to be distinguished are both the extent of the obligation, if any, of the prosecutor to make potential witnesses available to the defense, and the entitlement of the defendant to an instruction as to inferences which may be drawn from the failure of the prosecution to call a witness; but neither of such issues has any place in this case.)

Additionally, defendant contends that it was prejudicial error to deny defense counsel's request to call Fodderell to the witness stand and to put him to his claim of privilege against self-incrimination in the presence of the jury. We have no hesitancy to state our conclusion that there was no abuse of discretion by the trial judge in this regard. (*United States v. Martin*, 526 F. 2d 485, 487.)

More troublesome is the question identified and addressed in the opinions at the Appellate Division and adverted to by the People -- whether in the circumstances of this case the failure of the prosecution to confer immunity, and thereby to make Fodderell's testimony available to the defendant, warrants reversal (*cf. People v. Tyler*, N. Y. 2d , dec. herewith).

There can be no serious doubt as to Fodderell's right to assert his constitutional privilege in this case. Even if the content of his prospective testimony were to be deemed insulated by his conviction on the federal charges -- a proposition which is not entirely clear -- there is substance to the argument that his proposed testimony would have been so inconsistent with prior statements he had made to federal authorities as to expose him to conviction for perjury. No serious contention is now advanced that the privilege was not warranted; the focus is rather on the prosecution's failure to respond to the court's urgings that the witness be granted immunity.

In our analysis, if it be assumed both that the witness properly exercised his right to refuse to testify and that the testimony he would have given would have been materially exculpatory (as appears to have been the conclusion of the trial court),[1] the failure of the prosecution to grant immunity did not deny defendant due process or deprive him of his right to a fair trial in the circumstances of this case.

1. We do not consider it significant that the nature and particulars of the proposed testimony were never revealed to the prosecution or that defense counsel never made a formal tender of proof. It suffices that the trial judge satisfied himself as to the content of the testimony and evaluated it as exculpatory if believed. We think this provides a sufficient basis for the rights to which defendant is said to be entitled.

Preliminarily we observe that the right guaranteed a defendant under the Sixth Amendment to our Federal Constitution, "to have compulsory process for obtaining witnesses in his favor," like so many other rights, whether of constitutional sanction or of lesser stature, is not absolute. The right exists only to the extent that witnesses may otherwise be compelled to attend and to testify; the Constitution mandates no more. Thus, there is manifestly no constitutional right to obtain the attendance of a witness who has died or disappeared or is otherwise unavailable. Similarly there is no right to compel testimony over a claim of recognized privilege such as that of client-attorney or of penitent-priest. Nor may testimony be extracted from a witness who appears but persistently refuses to testify despite the sanction of punishment for contempt. Furthermore, in none of such instances do our courts accord a broader meaning to the Sixth Amendment guarantee by holding that where the desired testimony may not be compelled, such circumstance requires that the conviction of the defendant be set aside. So, too, it must be where the testimony is unavailable because the witness takes refuge in his constitutional privilege against self-incrimination. "The Government cannot be penalized, either under the Compulsory Process Clause of the Sixth Amendment or the law of entrapment, because [Fodderell] chose to exercise his Fifth Amendment rights, thus making himself as unavailable for purposes of testimony as the

deceased informant in *United States v. Soto* (504 F. 2d 557)." (*United States v. Gomez-Rojas*, 507 F. 2d 1213, 1220, cert. den. *sub nom. Gomez-Rojas v. United States*, 423 U. S. 826.)

The issue in the present case must be approached, therefore, not in the perspective of defendant's rights under the Sixth Amendment, but rather in the perspective of defendant's right to due process. "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution" (*Brady v. Maryland*, 373 U. S. 83, 87). The critical issue, of course, is when may it be said that the prosecution is "suppressing" such testimony? In its normal context suppression is thought to connote a wilful, or, in rare instances, an unintentional, withholding of evidence. There was no such suppression here, however, inasmuch as defendant was apprised of the identity of the informer and afforded an opportunity to interview him. Fodderell was later produced at the courthouse. In these circumstances, no issue can be raised as to any violation of defendant's right to disclosure of the identity of the informer (cf. *People v. Goggins*, 34 N. Y. 2d 167), or as to any failure of the prosecution to produce the informer. The question here is whether more may be required of the prosecution; was this defendant's constitutional right to a fair trial denied because the prosecution did

not take substantial affirmative steps and by granting effective immunity make the critical testimony available to the defense?

We agree, *arguendo*, that there might be substance to a contention that if an informer has also been an active participant in the criminal transaction -- as an agent of the law enforcement authorities -- the prosecution may not block a defendant's access to the testimony of such a witness by refusing to grant immunity. In those circumstances it could be argued that the People had placed themselves on the horns of a dilemma and must either grant effective immunity (thus making the testimony available to the defendant so far as it lies within the power of the prosecution to do so), or, alternatively, accept a dismissal of the prosecution (*Rovario v. United States*, 353 U. S. 53, 61). The delineation of the obligations of the prosecution and of the rights of the defendant in such a situation, however, must await another day. That is not the case now before us.

In the present instance, at most Fodderell was a facilitator and an observer. He was the source of the information which led to investigation of defendant and he participated in the preparations for the sales. He may have been an eyewitness to one of them. In short, his was the now familiar role of the informer; he was not an actor in the criminal transactions. The limited extent of Fodderell's involvement is determinative. The prosecution here was not obliged to grant immunity and its failure

to do so does not entitle this defendant to a reversal of his conviction (*United States v. Bautista*, 509 F. 2d 675, 677, cert. den. *sub nom. Monsivais v. United States*, 421 U. S. 976, *Earl v. United States*, 361 F. 2d 531, cert. den., 388 U. S. 921).

We have examined the other assertions of error advanced by defendant and find them to be without merit. In particular, it was not error to deny defense counsel access to a tape recording of a post-indictment interview between defendant and the police. The trial court listened to the entire recording and concluded that it was of an interview in which the police sought defendant's cooperation in wholly unrelated matters, and that there was nothing therein having any relevance to the case on trial. The assertion that there might be material oh the tape which could be used on cross examination of defendant and that that possibility chilled defendant's readiness to take the witness stand in his own behalf, to the extent that it is not met by the trial court's evaluation of the recording, is the product only of sheer, unsupported speculation.

Nor was it error to deny defense counsel's request to play to the jury another tape recording of a conversation between defendant and his counsel, assertedly prepared *ante litem motam*, designed to substantiate the claimed defense of entrapment. This would have been self-serving hearsay of the most evident nature (cf. Richardson, Evidence [10th Ed.], §356).

Finally, we find no error in the trial court's instructions to the jury with respect to the tape recordings made of the criminal transactions which constituted the basis for the charges against defendant or in its refusal to give the circumstantial evidence charge requested by defense counsel.

The order of the Appellate Division should be affirmed.

Order affirmed.

Opinion by Jones, J.

All concur.

Decided December 28, 1976.

Supreme Court, U. S.
FILED
JUL 7 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1591

JOSEPH SAPIA,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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October Term, 1976

No. 76-1591

JOSEPH SAPIA,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The Court of Appeals of the State of New York unanimously affirmed the judgment in an opinion reported at 41 N.Y. 2d 160 (1976).

The Appellate Division of the Supreme Court of the State of New York, First Department, had previously affirmed the judgment (one judge dissenting) in an opinion reported at 48 A.D. 2d 524 (1st Dept. 1975).

STATEMENT OF THE CASE

Introduction

In two transactions, one on June 27 and another on July 6, 1973, petitioner sold nearly two and one-half pounds of heroin to an undercover officer for nearly $40,000. Petitioner was indicted and charged with criminally selling a dangerous drug in the first degree (New York Penal Law §220.44), and criminally selling a dangerous drug in the third degree (New York Penal Law §220.35). Petitioner went to trial in New York Supreme Court in front of Justice LEONARD SANDLER and a jury. The jury convicted petitioner on both counts. On November 14, 1974, petitioner was sentenced to terms of imprisonment of from 15 years to life, and from one to three years, to run concurrently.

The Evidence at Trial

The People's Case

On June 26, 1973, undercover Police Officer **Robert Hayward** went with confidential informant Earl Fodderell to the Bronx apartment of Robert Gardner to attempt to purchase narcotics (Hayward: 483-493).* After Fodderell introduced Officer Hayward to Gardner, Gardner said he could obtain an eighth of a kilogram of heroin for $4500 (Hayward: 496-497). Gardner said that his "man" would be there soon with the narcotics, but the "man" never showed up. Officer Hayward then left the apartment, saying that he would return the next evening (Hayward: 502).

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* The page references are to the typed transcript of the trial.

Hayward returned with Fodderell on June 27 (Hayward: 506-507). Gardner said that the deal was set for $4700: $4500 would go to the "man" supplying the heroin, and $200 would go to Gardner as a "promoter's" fee. Officer Hayward gave Gardner the $4700, and Gardner left the apartment (Hayward: 511-513).

After a short time, Gardner returned to the apartment, followed moments later by his "man," petitioner Joseph Sapia (Hayward: 513-514). Sapia, holding a plastic bag of white powder, explained to the officer how to extract a test sample of heroin from the bag. He then handed the bag to the officer (Hayward: 514-519). The bag contained over four ounces of heroin (Argrett [chemist]: 1101-1104).

On July 3, 1973, Officer Hayward spoke by telephone with Sapia. Sapia agreed to sell Officer Hayward one kilogram of heroin for $34,500, and the deal was set for July 6 (Hayward: 560).

On July 6, Officer Hayward and Sapia met outside a Bronx bar. (Fodderell, the informant, was not present on this occasion.) Pursuant to Sapia's instructions, Officer Hayward drove alone to West 108th Street and Central Park West in Manhattan. There, Sapia got into the officer's car. The officer, in accordance with the plan, got out of the car, leaving the money ($34,500) with Sapia. Sapia then drove off (Hayward: 575).

Moments later, a youth who had been with Sapia approached Officer Hayward and directed him to where his car was now parked. Hayward got into the car. The money was gone, and in its place Hayward found two plastic bags

containing approximately a kilogram of heroin (Hayward: 577-578; Catalano [chemist]: 1161-1164).

Several weeks later, on August 16, 1973, Officer Hayward met Sapia by chance. Sapia indicated that he was interested in resuming their business relationship and that he again had substantial quantities of heroin to sell (Hayward: 621-623).

On September 20, 1973, Sapia and Gardner were arrested (Hayward: 597).

The Defendant's Case

The defense called as a witness **Mary Ann Bobick**, the wife and secretary of Sapia's chief trial counsel, Edward Bobick. Through her testimony, the defense sought to introduce into evidence an affidavit of Sapia and a tape recording of a conversation between Sapia and Mr. Bobick. (Both the affidavit and tape recording had been prepared on August 16, 1973, after the narcotics transactions but before Sapia's arrest.)

According to Sapia's affidavit, Fodderell had asked Sapia to obtain half of a kilogram of heroin. Sapia claimed he was afraid that Fodderell was going to "set him up * * * on a phony charge" (1379). In the tape recorded conversation, Sapia told his attorney that he had delivered narcotics for Fodderell to an individual named "Glen" (the undercover officer), but had only done so because Fodderell, who was about to go to prison, had offered to give Sapia his "Jersey [drug] contacts" and to let Sapia have "Glen" for Sapia's "own account" (1388).

The trial court, after extensive argument, ruled that the affidavit and tape recording were inadmissible because they were self-serving hearsay (1385-1438). The court also ordered the testimony of Mrs. Bobick (relating to the preparation and custody of the affidavit and recording) stricken in its entirety.

POINT I

A prosecutor does not have a constitutional duty to grant immunity to defense witnesses.

Following his rejection of the defense offer into evidence of the tape recording of the conversation between petitioner and his attorney, the trial judge suggested that the defense might wish to call the informant, Earl Fodderell, to give testimony relating to the defense contention that Fodderell had supplied the drugs that petitioner sold to Officer Hayward (1423). At first, the defense vehemently opposed the judge's suggestion. One of petitioner's attorneys stated that "there is no reason whatsoever in the world to think [Fodderell] would be in any way sympathetic" (1423). However, when the judge would not reconsider his ruling on admissibility of the defense tape recording, the defense decided to chance an interview with Fodderell (1479).

Fodderell was then imprisoned at the Federal House of Detention in Manhattan. He was serving a 12-year sentence on a narcotics-related conviction but had an application for resentencing pending because of his cooperation with the police (83, 1445, 1665-1666). After having spoken to Fodderell, the defense counsel requested that he be brought to court (1479, 1530). Fodderell appeared with his attorney.

Fodderell's attorney told the court that his client would assert his privilege against self-incrimination and refuse to answer all material questions unless granted immunity (1541). Fodderell's attorney also said that he would not permit the defense to see the sealed minutes of the sworn statement Fodderell had made in federal court concerning his cooperation in the Sapia case.

After an *in-camera* discussion with Fodderell's attorney outside the presence of the defense counsel and the prosecutor, the trial judge stated that the testimony that Fodderell would give under a grant of immunity would be exculpatory to some extent, if believed by the jury (1541-1542, 1570).* The trial judge also stated that that same testimony "undoubtedly would be incriminating as to Mr. Fodderell" (1575) and would describe activities which were outside the scope of his authority as an informant (1639).

The trial judge did not rest on the representations of Fodderell's attorney that Fodderell would invoke the Fifth Amendment. He also had Fodderell take the witness stand (outside the presence of the jury) and be sworn (1584). He asked Fodderell whether Fodderell would answer questions concerning his activities in the Sapia investigation (1585). At first, Fodderell was uncertain. He said, "I hope I'll be able to speak freely. I don't want to see an innocent man go to jail for something he's totally not responsible for. Then on the other hand, I don't want to incriminate myself. I don't want to be prosecuted because I'm doing enough

* The trial judge later stated that Fodderell's testimony would "have a bearing on" an entrapment defense (1681), and that "if believed, would not require the jury to acquit * * *, but that under a very plausible interpretation of the drift of the Supreme Court decision in the *Russell* case [*Russell* v. *United States*, 411 U.S. 423 (1973)], it might" (1742-1745).

time" (1585-1586). Then Fodderell decided that he would "go against [his] attorney's advice and answer the questions" (1588). Fodderell also said that he saw "no harm" in permitting the defense to see the minutes of his statement in federal court (1588-1599).

Petitioner's attorneys then discussed with Fodderell his proposed testimony, and reviewed the minutes of his prior sworn statement. When petitioner's attorneys learned that Fodderell's statement in federal court had been totally inconsistent with his proposed testimony (1593), they declined to call Fodderell immediately to the stand. Instead, they advised Fodderell that they did not "want him to lie and risk perjury" (1593) and suggested that Fodderell discuss the matter more fully with his own attorney (1595). Petitioner's attorney conceded that "this witness is not going to be effective for us * * * if he is going to be wholly inconsistent * * * and is going to be impeached by a prior sworn statement" (1594).

On the following day, Fodderell, having been advised by his counsel of the possible consequences of giving his proposed testimony, reconsidered his decision to testify on petitioner's behalf. He informed the trial judge that unless granted immunity from prosecution he would assert his privilege against self-incrimination (1636-1637). The prosecutor declined to request a grant of immunity for Fodderell,* and Fodderell was excused as a witness (1655).

* The New York statute on immunity grants states:

> In any criminal proceeding, other than a grand jury proceeding, the court is a competent authority to confer immunity * * * but only when expressly requested by the district attorney to do so [New York CPL §50.30].

Petitioner contends that the prosecution's failure to request immunity for Fodderell denied petitioner his right to due process of law.

We have found no case which has held that the prosecution has a constitutional duty to give immunity to defense witnesses. The leading case on the subject is *Earl* v. *United States*, 361 F.2d 531 (D.C. Cir. 1966) (BURGER, J.), *cert. denied*, 388 U.S. 921 (1967), which held to the contrary.*

Virtually every court which has considered the issue, has followed the holding of *Earl*. *See United States* v. *Smith*, 542 F.2d 711, 715 (7th Cir. 1976); *United States* v. *Bautista*, 509 F.2d 675, 677 (9th Cir.), *cert. denied sub nom. Monsivais* v. *United States*, 421 U.S. 976 (1975); *United States* v. *Allstate Mortgage Corp.*, 507 F.2d 492, 494-495 (7th Cir.), *cert. denied*, 421 U.S. 999 (1975); *United States* v. *Ramsey*, 503 F.2d 524, 532-533 (7th Cir. 1974), *cert. denied*, 420 U.S. 932 (1975); *Cerda* v. *United States*, 488 F.2d 720, 723 (9th Cir. 1973); *United States* v. *Jenkins*, 470 F.2d 1061, 1063-1064 (9th Cir.), *cert. denied*, 411 U.S. 920 (1972); *United States* v. *Lyon*, 397 F.2d 505, 512-513 (7th Cir.), *cert. denied*, 393 U.S. 846 (1968); *Morrison* v. *United States*, 365 F.2d 521, 523-524 (D.C. Cir. 1966); *United States* v. *Jones*, 404 F. Supp. 529, 538-540 (E.D. Pa. 1975); *United States ex rel. Tatman* v. *Anderson*, 391 F. Supp. 68 (D.Del. 1975); *Peters* v. *State*, 233 N.W.2d 420, 429-430 (Wisc.

* The *Earl* Court, in a footnote, left open the possibility that there would be a denial of due process where the prosecution sought immunity for one of its eyewitnesses while declining to seek immunity for an eyewitness for the defense. 361 F.2d at 534 n.2. That situation, of course, did not exist in the instant case.

1975); *Terell* v. *United States*, 294 A. 2d 860, 864 (D.C. App. 1972); *State* v. *Shaw*, 429 P.2d 667, 669 (Ariz. 1967).*

In any event, even if the Court should wish to review this generally accepted principle, this is not an appropriate case.

First, this case does not present the more usual situation where the prosecution is asked simply to grant a defense witness immunity from the use of his testimony. This case presents the more unusual, and more difficult case for a prosecutor. Under New York law, the prosecutor could not request mere use immunity. Only full transactional immunity could be granted, that is, immunity "for or on account of any transaction, matter, or thing concerning which [the witness] gave evidence. * * *" New York CPL §50.10(1).

Second, even if there might be cases in which it is legitimate to present a prosecutor with the choice of giving a defense witness transactional immunity or giving up the prosecution of the defendant, certainly a prosecutor should not be asked to make that choice without being allowed to know anything about what the defense witness will say. (What the defense witness says on the witness stand will define the scope of his transactional immunity.) In this case, neither the defense counsel, Fodderell's counsel, nor the trial judge would reveal the nature of Fodderell's testi-

* We have found only two cases in which the failure to grant immunity to a defense witness contributed toward reversal of a conviction. In one, the prosecutor intimidated a defense witness into asserting his privilege and then refused to grant immunity. *United States* v. *Morrison*, 535 F.2d 223 (3d Cir. 1976). In the other, an intermediate Ohio appellate court held that, under an Ohio statute, a court could grant immunity to a witness upon the request of a defendant. *State* v. *Broady*, 321 N.E. 2d 890 (Ohio App. 1974).

mony. Further, Fodderell was described as being one of the 100 top narcotics dealers in New York City (Bruno: 89). The prosecutor thus could not reasonably have consented to grant Fodderell full transactional immunity without any idea of how broad that immunity would be.

Finally, there is no reasonable likelihood that Fodderell's testimony would have exculpated petitioner. The trial judge and defense counsel said that Fodderell's testimony could be relevant to an "entrapment defense" (1680-1681). It is obvious that they were not talking about the usual variety of "entrapment defense," because that defense is not available to someone with a predisposition toward selling narcotics; it is clear from this record, and from the evidence that petitioner himself wanted to introduce, that petitioner had that predisposition.*

What the trial judge and defense counsel were talking about was the type of entrapment defense discussed in *dicta* in *Russell* v. *United States*, 411 U.S. 423, 431-432 (1973). That defense is that where an agent of the govern-

* Petitioner demonstrated his predisposition to sell drugs in several ways. Petitioner showed throughout his dealings with the undercover officer that he was a sophisticated narcotics "businessman" who wished to keep the officer as a steady customer (*see, e.g.*, trial record at 514-519). Further, when petitioner met the undercover officer by chance on August 16, 1974, petitioner again offered to sell large quantities of heroin to the officer (Hayward: 623). Moreover, the prosecution had evidence that petitioner had previously been found in possession of 686 glassine envelopes of heroin (1406-1407), further demonstrating petitioner's predisposition to sell narcotics. Finally, petitioner himself wished to introduce the tape recording of a conversation between petitioner and his attorney in which petitioner claimed that he delivered the drugs in order to get Fodderell's New Jersey drug "contacts" while Fodderell was in jail, and to get the undercover officer as a drug customer of petitioner's own. That conversation further demonstrates that petitioner was a narcotics "businessman" and not an "unwary innocent."

ment supplied the narcotics, then a due process violation is established as a matter of law, even if the defendent is predisposed to sell narcotics. In fact, the trial judge specifically referred to *Russell* in explaining why he thought Fodderell's testimony might be exculpatory. He stated that Fodderell's testimony, if believed, "might" require the jury to acquit "under a very plausible interpretation of the drift of the Supreme Court decision in the *Russell* case • • •" (1742-1745).

However, even if the jury had believed Fodderell's putative testimony that he had supplied the drugs to petitioner, it would not have exculpated petitioner. First, the doctrine that entrapment could be established even where the defendant was predisposed to commit the crime has never been the law of New York. *See, e.g., Matter of Nigrone* v. *Murtagh*, 46 A.D.2d 343, 350 (2d Dept. 1974), *aff'd on other grounds*, 36 N.Y.2d 421 (1975). Second, subsequent to the trial in the instant case, the doctrine that entrapment is established by the government's supplying of the drugs despite the defendant's predisposition to sell drugs was rejected by this Court in *Hampton* v. *United States*, 425 U.S. 484 (1976). Thus, it is clear that Fodderell's proposed testimony here was not exculpatory. Accordingly, this is not a good case for reviewing the general question of whether the prosecution may be required to grant immunity to defense witnesses.

POINT II

Petitioner's other contentions are without merit and do not warrant review.

1. Petitioner contends that the prosecution was required to call the informant, Fodderell, as its own witness.

However, as the cases make clear, the prosecution's obligations under the Confrontation Clause, the Compulsory Process Clause, and the Due Process Clause were met when the prosecution made Fodderell's identity known, and made him physically available to the defense. *United States* v. *Tatum*, 496 F.2d 1282, 1284 (5th Cir. 1974); *United States* v. *D'Angiolillo*, 340 F.2d 453, 455-456 (2d Cir.), *cert. denied*, 380 U.S. 1090 (1965). We are aware of no case in this or in any other court which requires more.

2. Petitioner contends that the trial court deprived him of his right to compulsory process to obtain witnesses in his favor when the court denied the defense request to have Fodderell invoke his Fifth Amendment privilege in the jury's presence.

The trial court had ascertained through an *in-camera* discussion with Fodderell's attorney that Fodderell's testimony would be self-incriminating. The defense attorneys (who had spoken to Fodderell) agreed with the trial court's assessment that Fodderell's testimony would be self-incriminating (1575), but nevertheless requested permission to call Fodderell as a witness and have him invoke his privilege in the jury's presence (1648-1651). The trial court noted the possible prejudicial effect of "very suggestive" questions followed by Fodderell's asserting his Fifth Amendment privilege, and denied the defense request (1652).

The assertion by a witness of his privilege against self-incrimination is not a matter for the jury's consideration. *United States* v. *Martin*, 526 F.2d 485, 487 (10th Cir. 1975). Moreover, if asserted in the presence of the jury it is "likely to be regarded as high courtroom drama and a focus of ineradicable interest, when in fact its probative force is weak and it cannot be tested by cross-examination." *United States* v. *Lacouture*, 495 F.2d 1237, 1240 (5th Cir.), *cert. denied*, 419 U.S. 1053 (1974). Consequently, it was well within the trial court's discretion not to allow the witness to be called to the witness stand to assert his privilege in the presence of the jury. *Roznovsky* v. *Estelle*, 546 F.2d 1185 (5th Cir. 1977); *United States* v. *Harris*, 542 F.2d 1283, 1297-1298 (7th Cir. 1976); *United States* v. *Martin*, *supra*; *United States* v. *Lacouture*, *supra*; *United States* v. *Johnson*, 488 F.2d 1206 (1st Cir. 1973).

In any event, the trial judge not only informed the jury that Fodderell had been called as a defense witness and had invoked the privilege (1659), but also allowed the defense counsel considerable latitude in summation to comment upon Fodderell's failure to testify (1764-1766). The trial judge thereby gave the petitioner the advantage of whatever probative value Fodderell's claim of privilege had.

3. Petitioner contends that the trial court denied him his right to compulsory process when the court excluded petitioner's pre-trial affidavit and tape recording from evidence.

The trial court ruled that the affidavit and tape recording should be excluded as self-serving hearsay. The court stated that they were "spurious" and appeared to have been "set up by Mr. Sapia for the purpose of creating a basis for a defense" (1434-1435). The affidavit and tape recording were offered for the truth of their contents, and were clearly hearsay. Moreover, petitioner has offered no exception to the hearsay rule under which they would have been admissible, even as a matter of state law. *See generally* C. McCormick, *Evidence* §246 (2d ed. 1972).

4. Petitioner contends that the trial court's ruling admitting into evidence statements of Gardner denied petitioner due process of law because there was no charge of conspiracy in the indictment.

Whether or not petitioner was charged with conspiracy in the indictment, Gardner was in fact petitioner's agent and co-conspirator. Gardner arranged the initial drug transaction on petitioner's behalf, and assisted petitioner in its execution. Accordingly, the statements in furtherance of the common scheme or plan were admissible against petitioner.

The admission of a co-conspirator's statement "does not depend upon the indictment, but is merely an incident of the general principle of agency that the acts of any agent, within the scope of his authority, are competent against the principal." *United States* v. *Olweiss*, 138 F.2d 798, 800 (2d Cir. 1943), *cert. denied*, 321 U.S. 744 (1944). *Accord, Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972), *cert. denied*, 409 U.S. 1128 (1973). Consequently, the trial court's ruling was correct and does not raise a federal constitutional issue.

5. Petitioner contends that the prosecution's taking of a statement from petitioner outside his counsel's presence, and the prosecution's failure to disclose its contents to the defense, violated petitioner's right to counsel.

Following petitioner's indictment, and while he was free on bail, police officers involved in petitioner's arrest discussed with him the possibility of his assisting them in their investigation of other matters (892). At the beginning of this conversation, which was recorded, the police told petitioner that they did not wish to discuss the case pending against him (892). Although the police indicated that petitioner's cooperation might be helpful to him with respect to sentencing should he be convicted in the instant case, the facts of this case were not discussed. At trial, the judge heard the tape and verified that its contents had no relevance to the case on trial (893, 895, 1320). Also, the prosecutor indicated that he did not intend to offer the tape recording into evidence (893). Because of the confidential nature of the other investigations discussed by the police with petitioner, the prosecutor declined to permit the defense to hear the tape recording (893-894, 1320-1321).

In *Massiah* v. *United States*, 377 U.S. 201 (1964), relied upon by petitioner, this Court stated:

> We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statement, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution

as evidence against *him* at his trial. *Id.* at 207 (emphasis in original).

Because the purpose of the police here was to further their investigative efforts relating to crimes other than that with which petitioner was charged, because they did not obtain "a statement from defendant on which they could convict him," *Spano* v. *New York,* 360 U.S. 315, 324 (1959), and because the prosecution had no intention of using, and did not in fact use, the conversation (or any evidence derived from it) against petitioner at his trial, it is clear that petitioner's right to conusel was in no way abridged.

Conclusion

The petition for a writ of certiorari should be denied.

Rspectfully submitted,

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July, 1977